

Before the
Federal Communications Commission
 Washington, D.C. 20554

RECEIVED

JUN 17 2004

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of:)
)
 i2way Request for Declaratory Ruling)
 Regarding the Ten-Channel Limit)
 of Section 90.187(e) of the Commission's Rules)
)
 Hexagram Petition to Deny i2way)
 Applications)

WT Docket No. 02-196

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

i2way Corporation ("i2way"), by its attorney and pursuant to Section 1.106 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), hereby submits this Opposition to the Petition for Reconsideration filed by Hexagram, Inc. ("Hexagram") on June 4, 2004 in the above-referenced proceeding.

INTRODUCTION

In its *Memorandum Opinion and Order* released on May 5, 2004,¹ the Commission dismissed an application for review filed by Hexagram against certain i2way applications. In turn, Hexagram petitioned for reconsideration of that dismissal. For the reasons stated below, i2way opposes Hexagram's petition for reconsideration and urges the Commission to dismiss the

¹ *Memorandum Opinion and Order* (DA 04-108), WT Docket No. 02-196, adopted April 29, 2004, released May 5, 2004.

No. of Copies rec'd 0+9
 List ABCDE

petition without consideration.

OPPOSITION

1. Hexagram Has Not Satisfied the Very Exacting Requirements for Submission of a Petition for Reconsideration of a Commission Decision Denying an Application for Review.

The Commission's rules are clear on the showing that Hexagram must make in order to have its petition for reconsideration considered. Where the Commission has denied an application for review, Section 1.106(b)(2) of the rules provides:

a petition for reconsideration will be entertained *only* if one or more of the following circumstances is present: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.²

Hexagram is unable to demonstrate any facts that would allow it to meet this threshold test for filing a petition for reconsideration.

2. Hexagram Has Not Offered Any Compelling Justification for Grant of a Waiver of Section 1.106(b)(2) of the Commission's Rules.

Hexagram seeks to circumvent the restriction inherent in Section 1.106(b)(2) by requesting a waiver of the rule. Hexagram, however, offers scant justification for grant of the requested waiver. The time-honored standard for evaluating requests for waiver of the

² 47 C.F.R. § 1.106(b)(2) (2003). [Emphasis added.]

Commission's rules is contained in *WAIT Radio v. Federal Communications Commission*.³

Hexagram's filing does not provide any *WAIT Radio* analysis whatsoever.

WAIT Radio established the principle that favorable consideration of a waiver request is appropriate only if grant of the waiver will not undermine the fundamental purpose underlying the rule in question. In the instant case, Hexagram has failed to demonstrate that waiver of Section 1.106(b)(2) would not undermine the fundamental purpose served by the rule.

Hexagram's only possible justification for waiver is its assertion that the Commission did not give adequate consideration to Hexagram's earlier arguments. If the Commission were to allow a waiver of Section 1.106(b)(2) under this circumstance, it would be compelled to grant a similar waiver in all other cases in which an applicant or licensee could claim to be disappointed by a Commission decision.

3. Hexagram's Petition for Reconsideration is Frivolous and Constitutes an Abuse of the Commission's Processes.

The Commission has already considered, on two separate occasions, the issues raised by Hexagram in its June 4th filing. In addition to being in contravention of Section 1.106(b)(2), therefore, the filing is frivolous and constitutes an abuse of the Commission's processes. Hexagram has not presented any compelling basis, in law or under the FCC's rules, for consideration of its petition.

³ 418 F.2d 1153 (D.C. Cir. 1969).

4. Hexagram's Petition for Reconsideration Is An Admission That Its Operations Are in Violation of FCC Rules.

On page 2 of its petition for reconsideration, Hexagram describes its system as consisting of tens of thousands of transmitters on the same frequency. According to the petition, each Hexagram transmitter emits a short data burst, typically less than 1/10 second, two to four times each day, with a large system totaling perhaps 10,000 transmissions per hour. These devices, Hexagram states, achieve a very high spectrum efficiency. What Hexagram fails to disclose is that the "very high spectrum efficiency" is made possible, in part, by the fact that—despite its status as a secondary user—Hexagram purposely neglected to incorporate channel monitoring capability into the Star Fixed Network automatic meter reading equipment that Hexagram uses in the 450-470 MHz band.

Hexagram's thousands of transmitters have no receivers whatsoever associated with them, aside from the one remote centralized receiver that receives data from the transmitters. Lacking associated receivers, the transmitting stations are incapable of monitoring their assigned channels. Therefore, Hexagram and its customers have no ability to comply with FCC regulations regarding operations on shared channels. Lacking the ability to comply with the monitoring requirement, Hexagram's STAR Fixed Network cannot legally operate in the 450-470 MHz band.

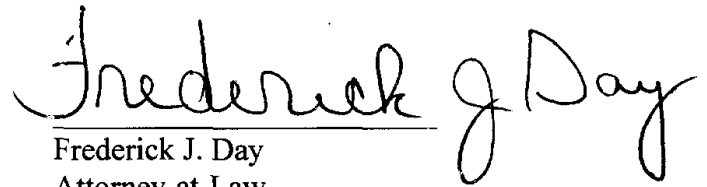
CONCLUSION

For the reasons stated above, i2way urges the Commission to dismiss Hexagram's filing as fatally defective on its face.

Respectfully submitted,

i2way Corporation

BY COUNSEL

A handwritten signature in black ink that reads "Frederick J. Day". The signature is written in a cursive style with a horizontal line underneath the name.

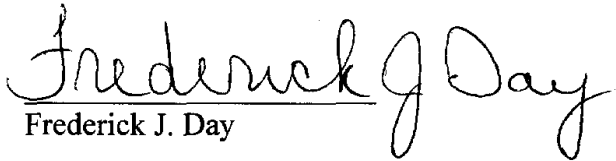
Frederick J. Day
Attorney-at-Law
5673 Columbia Pike, Suite 100
Falls Church, Virginia 22041
Phone: (703) 820-0110

June 17, 2004

Certificate of Service

I, Frederick J. Day hereby certify that on this 17th day of June, 2004, I sent a copy of the foregoing Opposition to Petition for Reconsideration via first-class mail, postage prepaid, to the following:

Mitchell Lazarus, Esq.
Counsel for Hexagram, Inc.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209-3801


Frederick J. Day